SABAH SHIPYARD SDN. BHD.

v.

JACKSON MARINE (M) SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
EUSOFF CHIN J
[ORIGINATING MOTION NO. R8-25-37-90]
28 JANUARY 1991

ARBITRATION: *Appointment of third arbitrator - Whether valid - Clear words of s. 11(1) of the Arbitration Act 1952 - Reference to three arbitrators - Umpire has to be notified of disagreement before intervening - Null and void - Interlocutory direction void as third arbitrator not appointed by other two - Arbitration Act 1952, ss. 10, 11.*

The parties, S and J, entered into an agreement (the said agreement), for the construction by S of two vessels for J. The said agreement contained an arbitration clause for settlement of disputes by three arbitrators, one each to be appointed by both parties and the third to be nominated by the two appointed arbitrators.

Pursuant to a dispute, S appointed R and J appointed Z as arbitrators; Y was appointed as the third arbitrator. Z delivered his award on 12 June 1989, Y on 31 October 1989 and R on 25 January 1990. Y and Z decided that J was entitled to RM1.16 million as liquidated damages and R held that J were not so entitled. Z and Y published the majority award on 8 February 1990.

On 27 July 1988, Y, Z and R made an interlocutory direction whereby Y was appointed the third arbitrator and it was stated that the award of any two of the arbitrators shall be binding on the parties.

The issue for the Court was whether the majority award of two of the three arbitrators made on 8 February 1990 is null and void as having been made in contravention of the provisions of ss. 10 and 11(1) of the Arbitration Act 1952 (the Act).

Held:

[1] The words in s. 11(1) of the Act are clear and mean that where an arbitration agreement, like the one in this case, provides that each party to the agreement has to appoint an arbitrator, and the two appointed arbitrators are required to appoint a third arbitrator, then the agreement must be read as if the appointment of the third arbitrator is an appointment of an umpire.

[2] (a) As the arbitration agreement is caught by s. 11(1), the provisions of s. 10 are automatically invoked and Y cannot act as an arbitrator but must assume the role of an umpire;

(b) pursuant to s. 10(2) and (3), the arbitrators must notify a party to the dispute or the umpire in writing, that they cannot agree on an award, before the umpire can enter on the reference in lieu of the two arbitrators;

(c) however, in this case, as Y delivered his award before R, Y had not yet acquired any jurisdiction to enter on the reference because R and Z had not yet disagreed on any award; in addition, Y has to receive written notification under s. 10(2) before he can make a reference;

(d) the majority award of Z and Y of 8 February 1990 is invalid and a nullity;

(e) since R and Z could not agree on an award and Y had made his award without jurisdiction, there is no award which binds the parties, and all the awards made by them must be set aside.

[3] (a) The fact that Y sat at the arbitration and participated in the interlocutory direction which appointed him as the third arbitrator is undesirable as Y had not been legally appointed and had no jurisdiction to do so under s. 10(2);

(b) the interlocutory direction shows that Y was appointed, not by Z or R, but by the parties to the arbitration agreement or that the parties consented to Y's appointment;

(c) Y's appointment was contrary to the arbitration clause in the said agreement and was null and void;

(d) the whole arbitration proceedings are rendered null and void.

[Order accordingly.]

Legislation referred to:
Arbitration Act 1952, ss. 10, (2), (3), 11(1), (2)

For the applicant - C.V. Das; M/s. Shook Lin & Bok
For the respondent - Wan Ahmad Farid b. Wan Salleh; M/s. Adnan & Wee

JUDGMENT

Eusoff Chin J:

The question is whether the majority award of two of the three arbitrators made on 8 February 1990 is null and void as having been made in contravention of the provisions of ss. 10 and 11(1) of the Arbitration Act 1952 (hereinafter referred to as the Act).

The applicant had agreed to construct for the respondent two vessels. The agreements signed by them contained the following Article 27.1:

> 27.1 Any dispute, claim or difference arising out of or related to this agreement or breach thereof, shall be first referred to the parties for an amicable settlement and in the event such referral fails, shall be finally settled **by arbitration of three (3) arbitrators, two arbitrators to be appointed each by both parties, and the third to be appointed by the two nominated arbitrators.** The proceedings and all papers sent or presented in connection therewith shall be in the English Language. The arbitration decision shall be final and binding on both parties and judgment upon the award of the arbitrators may be entered in any Court having jurisdiction thereof. The arbitration award shall be in lieu of any other remedy.

A dispute arose, and the applicant appointed Raja Aziz Addruse and the respondent appointed A. Zamani bin Mohamad as arbitrators. Peter Yip Shou Shan was appointed as the third arbitrator. There is some uncertainty as to who appointed the third arbitrator, and I shall deal with it later.

All the three arbitrators sat together and heard the dispute for five days.

Zamani delivered his award on 12th June 1989.

Peter Yip delivered his award on 31th October 1989.

Both Zamani and Peter Yip decided that the respondent was entitled to RM1,169,000 liquidated damages.

Raja Aziz Addruse delivered his award on 25th January 1990. He decided that the respondents were not entitled to the sum of RM1,169,000.

Both Zamani and Peter Yip published their majority award on 8th February 1990.

Learned Counsel for the applicant referred me to ss. 10 and 11 of the Act. Section 10 states:

> 10.(1) Unless a contrary intention is expressed therein, every arbitration agreement shall, where the reference is to two arbitrators, be deemed to include a provision that the two arbitrators shall appoint an umpire immediately after they are themselves appointed.
>
> (2) Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to include a provision that, if the arbitrators have delivered to any party to the arbitration agreement, or to the umpire, a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.
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> (3) At any time after the appointment of an umpire, however appointed, the High Court may, on the application of any party to the reference and notwithstanding anything to the contrary in the arbitration agreement, order that the umpire shall enter upon the reference in lieu of the arbitrators and as if he were a sole arbitrator.

Section 11 states:

> 11.(1) Where an arbitration agreement provides that the reference shall be to three arbitrators, one to be appointed by each party and the third to be appointed by the two arbitrators appointed by the parties, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties.
>
> (2) Where an arbitration agreement provides that the reference shall be to three arbitrators to be appointed otherwise than as mentioned in subsection (1), the award of any two of the arbitrators shall be binding.

To my mind the words used in s. 11(1) of the Act are crystal clear. Where an arbitration agreement, such as the one I am now considering, provides that each party to the agreement has to appoint an arbitrator, and the two appointed arbitrators are required to appoint a third arbitrator, then the agreement must be read as if the appointment of the third arbitrator is an appointment of an umpire.

But where three arbitrators are agreed to by the parties to settle any dispute arising out of an arbitration agreement, and the procedure of appointing the three arbitrators is not as that described in s. 11(1), then the three arbitrators may sit together and determine the dispute in which case the award of the majority shall be the valid arbitration award binding the parties to the dispute (s. 11(2) of the Act).

My view is that if an arbitration agreement is caught by s. 11(1) of the Act, then the provisions of s. 10 of the Act are automatically invoked, and shall be applied to that agreement.

Therefore in this application, Peter Yip, the third arbitrator appointed by both Zamani and Raja Aziz Addruse, cannot act as an arbitrator but must assume the role of an umpire. By s. 10(2) and 10(3) of the Act, the umpire:

(a) may enter on the reference in lieu of the two arbitrators and give his award only when the arbitrators have given a notice in writing to a party to the dispute, or to the umpire that they cannot agree on an award; or

(b) shall enter upon the reference if so ordered by the High Court upon, an application made by a party to the reference.

But as stated earlier, what had happened here is that after the arbitrator Zamani delivered his award on 12 June 1989, Peter Yip who should be the umpire, stepped in and gave his award on 31 October 1989. At that time Raja Aziz Addruse, the other arbitrator, had not even made up his mind what award he was going to make. Therefore at the time Peter Yip entered upon the reference and gave his award he had not yet acquired any jurisdiction to enter on the reference because the two arbitrators had not yet disagreed on any award.

Even if the two arbitrators had not agreed on an award, s. 10(2) of the Act requires that the arbitrators must first deliver a written notice to a party to the arbitration agreement or to the umpire stating that they cannot agree, then, and only then, is the umpire allowed to "forthwith enter on the reference in lieu of the arbitrators" and if that happens, the umpire shall be the sole arbitrator whose decision would be valid and binding on the parties.

I hold that the arbitration agreement is caught by s. 11(1) of the Act, and consequently, the provisions of ss. 10(2) and (3) of the Act should apply to the agreement.

The umpire Peter Yip had entered upon the arbitration without complying with the statutory requirement of s. 10(2) or (3) of the Act, and he therefore acted without jurisdiction. The majority award of Zamani and Peter Yip delivered on 8 February 1990 is invalid and a nullity, and cannot bind the parties to the arbitration agreement.

Since the two arbitrators Raja Aziz Addruse, and Zamani could not agree on an award, and Peter Yip had made his award without jurisdiction, there is no award which binds the parties, and all the awards made by them must be set aside.

There is one other point raised by the learned Counsel for the respondent, and that concerns an interlocutory direction made jointly by Zamani, Raja Aziz Addruse and Peter Yip on 27 July 1988. The relevant parts of the direction are as follows:

> **Interlocutory Directions**
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> Upon hearing Encik Alexander Decena of Counsel for Sabah Shipyard Sdn. Bhd. and Encik Wan Ahmad Farid of counsel for Jackson Marine (M) Sdn. Bhd., By consent the following are this day hereby given and it is ordered:
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> 1. That Encik Peter Yip Shou Shan of Messrs Yip, Yeo & Nasrim, Advocates & Solicitors, LG, IJM Annexe, Jalan Yong Shook Lin, 46700 Petaling Jaya, be appointed the third arbitrator.
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> 2. That the reference being to three arbitrators, the award of any two of the arbitrators shall be binding on the parties.
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> Sgd: Sgd:
> Raja Aziz Addruse Zamani Mohammad
>
> Sgd:
> Peter Yip Shou Shan

The learned Counsel for the respondent submitted that this interlocutory direction had been done with the consent of the parties, and since para. 2 of this direction states that the award of any two of them would bind the parties, the applicant is bound by the majority award. With respect, I cannot accept this argument to be correct.

To begin with, Peter Yip had no jurisdiction to sit and hear the parties with Zamani and Raja Aziz Addruse because under the law, Peter Yip could not enter upon the arbitration except where a party had been notified in writing by the arbitrators that the arbitrators could not agree on an award. The fact that Peter Yip sat at this arbitration sitting on 27 July 1988 and

participated in making the order appointing himself as the third arbitrator is itself most undesirable, for, unless he had been first legally appointed, how could he participate in this sitting. Further, if one reads the quoted portion of the interlocutory direction carefully, it would appear that Peter Yip Shou Shan was not appointed by Zamani and Raja Aziz Addruse, but by the parties to the arbitration agreement, or that Peter Yip's appointment was done only with the consent of the parties. Either way, the appointment was done contrary to what had been agreed to by the parties in Article 27.1 of agreement. Consequently, the appointment of Peter Yip as the third arbitrator would be null and void. That being so, it renders the whole arbitration proceedings null and void.

I therefore declare that all the awards of the arbitrators are a nullity and not binding on the parties. They are set aside. The deposit of RM1,169,000 placed in an escrow account with Bank Kemajuan by the applicant shall be released to the applicant.

Under the circumstances each party shall bear its own costs.

Also found at [1991] 2 CLJ 1020